

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PERRY A. WARD,

Plaintiff,

v.

EHW CONSTRUCTORS, et al.,

Defendants.

CASE NO. C15-5338 BHS

ORDER GRANTING IN PART,
DENYING IN PART, AND
RESERVING RULING IN PART
ON PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on Plaintiff Perry Ward's ("Ward") motion for summary judgment (Dkt. 28). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby rules as follows:

I. PROCEDURAL HISTORY

On May 21, 2015, Ward filed a complaint against Defendants EHW Constructors, American Bridge Company, J.V., Nova Group, Inc., and Skanska USA Civil Southeast, Inc. (collectively "EHW") in rem and in personam for personal injury. Dkt. 1. On June 22, 2015, Ward filed an amended complaint alleging that EHW has failed to pay mandatory maritime benefits. Dkt. 12.

1 On January 14, 2016, Ward filed a motion for summary judgment. Dkt. 28. On
2 February 25, 2016, Ward supplemented his motion. Dkt. 44. On March 14, 2016, EHW
3 responded. Dkt. 48. On March 18, 2016, Ward replied and filed three additional
4 declarations. Dkt. 57.

5 II. FACTUAL BACKGROUND

6 In May 2012, the U.S. Department of Defense awarded EHW the contract to build
7 an explosives handling wharf at Naval Base Kitsap-Bangor. The contract called for EHW
8 to construct a number of structures, including a covered slip long enough for a 560-foot-
9 long submarine, a warping wharf, trestle roads, power utility booms, hardened guard gun
10 positions, and a waterfront support. Dkt. 50, Declaration of William Eskins (“Eskins
11 Dec.”), 2.

12 The wharf project utilized a number of pieces of equipment. Among these were
13 several floating structures, including the *Ringer II*, which was an un-crewed floating
14 platform comprised of interlocking flexi-floats. The flexi-floats are a combination of
15 portable, interlocking modular barges and ancillary attachments, designed for use in
16 inland marine, heavy-construction applications, which, when connected, could reach
17 several hundred feet in length. The group of flexi-floats comprising the *Ringer II* was
18 held in place with anchors or “spuds” then maneuvered at the worksite either by tug or by
19 deck wenches. In addition to the flexi-floats, support skiffs were also used on the project
20 to transport materials and laborers. These skiffs are flat-decked boats; approximately
21 four feet wide and twelve feet in length with a small, 90-horsepower motors. The skiffs
22 were not used to move or reposition the flexi-float barges. *Id.* at 2–3.

1 On January 14, 2014, EHW hired Ward through Ward's local union for pile
2 drivers. Ward declares that he has been a pile driver for 36 years. Dkt. 30, Declaration
3 of Perry Ward, 2. The parties dispute the type of work Ward performed and whether he
4 qualifies as a seaman. Ward contends that his "work was always completely out on the
5 water, working on vessels doing the pile driving on piles out in the open, navigable
6 waters." *Id.* at 3. Ward further declares as follows:

7 All of the above [work] activities were . . . on vessels on the open
8 waterway of Hood Canal, unattached to land, and in navigation for uses and
9 purposes directly related to working on water. I was attached to/assigned to,
10 on a continual basis, these vessels as for purposes of at-sea work and I
11 never worked on land nor was I assigned to work on land. The vessel
12 Ringer II was always at least 300 to 500 yards from shore, and the skiff
13 would work in and around where the Ringer II was. None of my crew were
14 ever even arguably considered to be longshore or State Workers
15 Compensation participants and EHW never suggested or did anything other
16 than treat us as if we were crew members working together on vessels to
17 accomplish the mission and function of those vessels. I have never received
18 any benefits from any Longshore or State program and have never been
19 processed under any of those programs.

20 *Id.* at 4–5.

21 On the other hand, EHW contends that Ward was part of a construction crew
22 instead of a seaman. Steve Erickson, EHW's pile driving foreman, declares as follows:

Two different types of crews worked on the project at Naval Base
Kitsap-Bangor. One type of crew manned the vessels. This would include
the vessel captains and deckhands. The other type of crew was a
construction crew. The construction crews included crane operators,
piledrivers, carpenters, and other laborers. The construction crews were
responsible for the actual construction of the wharf. The wharf was an
extension of land and while the construction crew utilized the crane barges
and skiffs to complete their tasks, they were not assigned to operate or
maintain the vessels.

In my role as Piledriver Foreman, I had the opportunity to work with
Mr. Perry Ward. Both Mr. Ward and I were a part of the construction crew.

1 All work performed by the crew on which I worked, including the work
2 performed by Mr. Ward, was for the construction of the wharf.

3 Dkt. 52, Declaration of Steve Erickson, 2. Mr. Eskins declares as follows:

4 All work performed by the crew on which Mr. Ward worked was for
5 the construction of the wharf. Mr. Ward did not serve on the tug crews that
6 were used to reposition the RINGER II or other equipment. Mr. Ward's
7 time on barges and skiffs was spent performing work constructing the
8 Naval wharf.

9 To my recollection, Mr. Ward, as a piledriver, would spend
10 approximately 80% of his time performing precast and setting work on the
11 pilings for the wharf. This consisted of cutting off piles, using torches on
12 the piles, and setting pile plugs. He also worked on setting pre-casts for the
13 pilings on concrete. Mr. Ward spent 10 hours a day working for EHW
14 Constructors. Of that time, approximately 15-30 minutes would be spent on
15 Job Safety analysis meetings on the crane barges, 30 minutes would be
16 spent for lunch on the barges, and 30 minutes would be spent on the barges
17 for breaks. Mr. Ward would spend approximately another 30 minutes to an
18 hour on the barges gathering materials for his precasting or performing
19 preparation work on the pilings. All other times were spent on wharf
20 construction, and he would utilize floating platforms or a work skiff as a
21 work platform to perform his tasks. Mr. Ward was not hired, or responsible,
22 for piloting or maintaining the barges and tugs used by EHW Constructors
on the project. On a rare occasion, he would guide crane operators on the
use of winches to manipulate the crane barges. During those occasions, the
barges were anchored.

15 Eskins Dec. at 3-4.

16 On April 14, 2014, Ward was working on a skiff supporting the *Ringer II*. Ward
17 declares that he suffered injuries that day as he was helping lift a generator from the skiff
18 to the *Ringer II*:

19 The specific procedure established by EHW for us to follow which required
20 us to lift the generator from the skiff to the Ringer II by hand, rather than
21 using a crane. [Steve] Erickson, the supervisor, on board the Ringer II,
22 made an attempt to assist while we were in the middle of trying to fling the
generator onto the Ringer II. He grabbed onto the generator, lost control of
it, then dropped the generator back onto me. I braced myself, trying not to
fall into the water, which was at least 90 feet deep at this point. I tried to

1 push the generator back on the deck of the Ringer II. The jolt of the
2 generator falling directly on me created immediate severe pain in my neck
3 radiating down into my left arm. I lost mobility of my left arm and also had
4 immediate severe pain in my neck. I tried to continue to work hoping the
5 pain would go away.

6 Ward Dec. at 4. It is undisputed that there was no formal written report of Ward's injury.

7 Two of Ward's coworkers, however, declare that Ward was injured.

8 Johnny Meadows, a coworker, was assisting Ward in lifting the generator from the
9 skiff. *Id.* Mr. Meadows contends that, after the incident, "[Ward] would come to work
10 and just sit in the lunchroom on Ringer II holding his arm and shoulder, in obvious pain."
11 Dkt. 38, Declaration of Johnny Meadows, 3. Mr. Meadows also "helped fill in for
12 [Ward] by carrying work materials that needed to be moved because [Ward] could not lift
13 or carry much weight." *Id.*

14 Hawn Garten, another coworker, was at the wheel of the skiff when the incident
15 occurred. Ward Dec. at 4. Mr. Garten declares that he "witnessed Erickson simply drop
16 the generator back on Perry Ward when he – Erickson – could no longer hold on to it."
17 Dkt. 39, Declaration of Hawn Garten, 2. Mr. Garten also confirms that "[Ward] would
18 come to work and just sit in the lunchroom on Ringer II holding his arm and shoulder, in
19 pain." *Id.* at 3.

20 On the other hand, Mr. Erickson does not recall the incident in question.

21 Specifically, Mr. Erickson declares as follows:

22 I have been made aware that Mr. Ward alleges an injury sustained on
the job sometime between April 10, 2014 and April 17, 2014. I understand
that Mr. Ward alleges my involvement in an incident during that period
which involves the lifting of a generator. I also understand Mr. Ward

1 asserts that I caused and/or witnessed an accident to him, which led to an
2 injury to her [sic] neck and shoulder.

3 I recall being out at the Naval yard project for approximately one
4 week sometime in April 2014, but I cannot confirm I was out at the project
5 on the dates Mr. Ward alleges I was present. I also recall having to lift a
6 generator with Mr. Ward, but I do not recall losing control of the generator
7 or having the generator fall back on Mr. Ward. If a generator had fallen on
8 or near Mr. Ward, I would have reported said incident. At the very least, I
9 would have completed a near-miss report.

10 I do not recall Mr. Ward informing me that he injured himself during
11 this incident. I do not recall seeing Mr. Ward get injured. I do not recall Mr.
12 Ward asking for me to fill out an incident report. I do not recall Mr. Ward
13 asking me for medical care. I do not recall Mr. Ward asking me to report
14 the incident to a safety supervisor. I do not recall any investigation
15 occurring for this alleged incident. I do not recall any co-employees of Mr.
16 Ward informing me that he injured himself or needed medical care.

17 ***

18 I simply do not recall any injury to Mr. Ward while I worked with
19 him for the one week where I was his supervisor. I do not recall any
20 incident reported by Mr. Ward or any pain in the neck or shoulder
21 complained of by Mr. Ward to me during the week where I was his
22 supervisor.

1 I recall the area that Mr. Ward was standing during the generator lift
2 was about five feet wide. I recall the generator being about two-and-a-half
3 feet wide. Had there been an incident where the generator fell back on Mr.
4 Ward, it is likely that Mr. Ward would have either had the generator fall
5 right on top of him, or that he would have been knocked into the water. If
6 either of these events had occurred, a near-miss report would have had to
7 been [sic] at the very least. I never filled out a near-miss report or an
8 incident report for Mr. Ward. I was never asked to do so by Mr. Ward.

9 Dkt. 52, Declaration of Steve Erickson, 2–4.

10 With regard to Ward notifying anyone about his injury, Mr. Erickson, the project
11 superintendent, states that EHW has procedures for reporting work injuries. Specifically,
12 Mr. Erickson declares that

13 The [job] requirements include notification and reporting all injuries, no
14 matter how minor. Employees are also instructed of the necessary processes
15 for reporting an injury and acquiring medical care. This also is the same for
16 near-miss incidents. Furthermore, the time sheets for every employee for

1 EHW Constructors provides for a reporting mechanism to indicate whether
2 that employee suffered an injury on the day in question.

3 *Id.* It is undisputed that neither Ward nor any other employee completed an injury report
4 or a near-miss report. Moreover, the foreman's daily report for the date in question,
5 which was initialed by Ward, states that Ward was not injured on April 14, 2014. Dkt.
6 50-3 at 12.

7 Ward declares that, after the incident, he attempted to work through the pain. This
8 lasted until June 2014 when Ward "had to quit working" because he "could no longer
9 stand the pain from [his] injury." Ward Dec. at 2. Contrary to Ward's contention,
10 EHW's position is that Ward was terminated due to "a marked reduction in force and
11 absenteeism." Anderson Dec. at 3. Mr. Eskins, Ward's supervisor at the time, declares
12 as follows:

13 Around June 2014, Mr. Ward began missing significant amounts of
14 time from work. When I began to question Mr. Ward as to why he was
15 missing work, he informed me that he needed to miss time from work in
16 order to take care of a tree farm he had in Idaho. Often, he would call in and
17 indicate that he could not make it in to work because he was stuck at the
18 farm. This usually occurred on Mondays, but would occur during the week
19 as well. He never indicated he was acquiring medical care or that he
20 suffered an injury at work during any of our phone conversations. No one
21 has ever informed me that they received a call from Mr. Ward or about Mr.
22 Ward missing time related to a work injury. All of work absences were
related to work at his tree farm.

18 In July 2014, I decided that Mr. Ward had missed so much time due
19 to his work at his farm that we had to sever the employer/employee
20 relationship with him. Further, we began to run out of productive things
21 that were available for piledrivers to do, as there were certain phases of the
22 project that were slowing down. Since Mr. Ward had missed a lot of time
tending to another business, and we were slowing down; I made the
decision to terminate his employment with EHW Constructors.

I communicated my decision directly to Mr. Ward, who indicated he
was fine with the decision, as he needed to be out at his tree farm to

1 concentrate on his logging business. He voluntarily came in on his
2 termination date to sign the termination paperwork. He did not complain
3 about the reasons for termination. At the time of his termination, he did not
4 inform me that he was working with pain. At the time of his termination,
5 he did not request medical care. Both Mr. Ward, himself, and I signed the
6 termination paperwork.

7 Eskins Dec. at 5–6.

8 On July 1, 2014, EHW formally terminated Ward. *Id.* Judy Anderson, EHW’s
9 field administrator met with Ward in person and processed his termination paperwork.
10 Anderson Dec. at 4. The termination notice states that the reasons for termination were
11 reduction in force and lack of availability for work and is signed by Ward. *Id.*, Exh. 2.
12 Anderson recalls that Ward was “going to work on his log business after he left EHW
13 Constructors” and even provided Anderson with a business card, which shows Ward as
14 owner of Ape Log Creations. *Id.*, Exh. 3. With regard to Ward’s injury, Anderson
15 declares as follows:

16 Mr. Ward did not mention anything to me about any pain from
17 which he was suffering nor did he mention anything to me about any injury
18 he suffered while working for EHW Constructors. He did not appear in any
19 pain when I met with him. He was actually in a very amiable mood. He did
20 not have any complaints with his reasons for termination. He did not seem
21 to have any issue with leaving EHW Constructors, as he continued to
22 discuss his log business. Had Mr. Ward complained of any need for
medical care or any pain he was suffering, I would have sent him to our
safety officers.

Id. at 4.

On July 8, 2014, Ward sought medical treatment for his work-related injuries with
Dr. James M.T. Garrity, D.O. Ward reported “pain radiating into his left upper extremity
that is severe” Dkt. 31, Declaration of James Gooding, Exh. 1. Dr. Garrity assessed

1 a cervical sprain and recommended using Motrin for the pain as well as proceeding with
2 an MRI. *Id.*

3 In early 2015, Ward contacted the U.S. Department of Labor (“DOL”) regarding
4 his injury. On February 3, 2015, the DOL contacted EHW and informed it that Ward had
5 submitted a claim for compensation under the Longshore and Harbor Worker’s
6 Compensation Act. Ward Dec., Exh. 3. EHW turned the claim over to its insurance
7 carrier, Zurich. On February 16, 2015, Cynthia Schmidt, Zurich’s claim handler, sent a
8 letter to Ward regarding his claim stating that she had unsuccessfully tried to contact him
9 on multiple occasions. *Id.* On February 18, 2015, Ms. Schmidt sent a notice of
10 controversion to the DOL explaining that Zurich “controverts the claim in its’ [sic]
11 entirety due to late reporting and due to no medical documentation to support an on-the-
12 job injury.” Dkt. 55, Declaration of Cynthia Schmidt, Exh. 1.

13 III. DISCUSSION

14 Ward moves for summary judgment on his claims for maintenance and cure and
15 for dismissal of some of EHW’s affirmative defenses. Dkt. 28.

16 A. Summary Judgment Standard

17 Summary judgment is proper only if the pleadings, the discovery and disclosure
18 materials on file, and any affidavits show that there is no genuine issue as to any material
19 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
20 The moving party is entitled to judgment as a matter of law when the nonmoving party
21 fails to make a sufficient showing on an essential element of a claim in the case on which
22 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,

1 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
2 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
3 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
4 present specific, significant probative evidence, not simply “some metaphysical doubt”).
5 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists
6 if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
7 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
8 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
9 626, 630 (9th Cir. 1987).

10 The determination of the existence of a material fact is often a close question. The
11 Court must consider the substantive evidentiary burden that the nonmoving party must
12 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
13 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
14 issues of controversy in favor of the nonmoving party only when the facts specifically
15 attested by that party contradict facts specifically attested by the moving party. The
16 nonmoving party may not merely state that it will discredit the moving party’s evidence
17 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
18 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
19 nonspecific statements in affidavits are not sufficient, and missing facts will not be
20 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

21 Finally, with regard to the burden of proof, “*where the moving party has the*
22 *burden*—the plaintiff on a claim for relief or the defendant on an affirmative defense—

1 *his showing must be sufficient for the court to hold that no reasonable trier of fact could*
2 *find other than for the moving party.” Calderone v. United States, 799 F.2d 254, 259*
3 *(6th Cir. 1986) (citation omitted); see also Southern Calif. Gas Co. v. City of Santa Ana,*
4 *336 F.3d 885, 888 (9th Cir. 2003).*

5 **B. Ward’s Injury**

6 In this case, EHW argues that “[t]here are material issues of fact regarding
7 whether [Ward] was ever even injured while working for EHW.” Dkt. 49 at 12. Ward
8 counters that EHW has failed to submit actual evidence countering Ward’s version of the
9 events. Dkt. 57 at 3–8. But Ward fails to recognize that EHW is not obligated to submit
10 a declaration specifically contesting Ward’s version of the events. There is plenty of
11 evidence to raise a reasonable inference that Ward was not hurt. For example, why did
12 Ward say he was not hurt on the time card for that day’s work? Why did Ward not tell
13 any other person that he was hurt during the last two months of work or when he was
14 terminated? Combining these reasonable inferences with Ward’s heightened burden
15 while moving for summary judgment when he bears the burden shows that he is not
16 entitled to summary judgment. In other words, a reasonable trier of fact could find other
17 than for Ward. Therefore, the Court denies Ward’s motion on the issue of whether Ward
18 actually suffered an injury.

19 **C. Jones Act**

20 The Jones Act provides a remedy for “any seaman” injured “in the course of his
21 employment.” 46 U.S.C. § 688. A plaintiff is a Jones Act seaman only if (1) his duties
22 contribute to the function of the vessel or to the accomplishment of its mission, and (2) he

1 has a connection to a vessel in navigation that is substantial both in duration and in
2 nature. *See Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 1292 (9th Cir. 1997)
3 (citing *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995)). The issue of seaman status
4 under the Jones Act “is a mixed question of law and fact, and it often will be
5 inappropriate to take the question from the jury.” *Harbor Tug & Barge Co. v. Papai*, 520
6 U.S. 548, 554 (1997); *see also McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 355
7 (1991) (“seaman status under the Jones Act is a question of fact for the jury.”).

8 In this case, Ward has failed to show that, as a matter of law, he was a seaman
9 under the Jones Act. The most persuasive evidence that Ward is a seaman was
10 improperly submitted with Ward’s reply. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th
11 Cir.1996), *cert. denied* 522 U.S. 808 (1997) (quoting *Black v. TIC Inv. Corp.*, 900 F.2d
12 112, 116 (7th Cir. 1990)) (“Where new evidence is presented in a reply to a motion for
13 summary judgment, the district court should not consider the new evidence without
14 giving the [non]movant an opportunity to respond.”). In his second declaration, Ward
15 declares as follows:

16 I never worked on any land during my employment with EHW and I
17 have always been a marine-based pile driver. I never was physically on the
18 wharf while performing my work. Approximately 90 percent of my time
was spent on the Ringer II, a floating spud barge, landing pre-cast pilings in
approximately 90 feet of water. To get to shore I either had to take a tug
boat or skiff.

19 I spent a considerable amount of time in the skiff directing piles into
20 the water from the skiff. I was also required to work around the edge, often
banging off the edge, of the barge. The risk of falling into approximately 90
21 feet of open, navigable water was always a risk while performing my pile
driver duties.

22 While on the Ringer II we floated on anchors or spuds and had to
reposition the barge almost daily. This was done generally by pulling

1 anchors or being pushed by tug boats. I was on the barge when this
2 repositioning occurred. I also assisted in setting and retrieving anchors on
the barge which was a dangerous job.

3 Dkt. 58, Second Declaration of Perry A. Ward, ¶¶ 2–4. Although this evidence tends to
4 show that Ward was a seaman, the Court may not properly consider it unless EHW is
5 afforded an opportunity to respond. Therefore, the Court reserves ruling on this issue and
6 will set a briefing schedule.

7 **D. Affirmative Defenses**

8 Ward moves for summary judgment on thirteen of EHW's affirmative defenses.
9 Dkt. 28 at 19–24. Some of Ward's arguments have merit. For example, EHW's
10 affirmative defenses of improper venue and failure to perfect service have most likely
11 been waived at this point. Fed. R. Civ. P. 12(h)(1). Moreover, EHW failed to respond to
12 Ward's arguments as to EHW's first, second, fourth, and seventeenth affirmative
13 defenses. Upon review of the record and the pleadings, the Court concludes that Ward is
14 entitled to summary judgment on these defenses and grants Ward's motion on these
15 issues.

16 With regard to the remainder of Ward's arguments, the Court concludes that Ward
17 has failed to show that he is entitled to judgment as a matter of law and that no questions
18 of material fact exist. Therefore, the Court denies the remainder of Ward's motion on
19 EHW's affirmative defenses.

20 **IV. ORDER**

21 Therefore, it is hereby **ORDERED** that Ward's motion for summary judgment
22 (Dkt. 28) is **GRANTED in part, DENIED in part, and RESERVED in part** as stated

1 herein. EHW may file a response to Ward's additional evidence no longer than 12 pages
2 no later than April 29, 2016. Ward may file a reply no longer than 12 pages no later than
3 May 6, 2016. The Clerk shall renote the motion for consideration on the Court's May 6,
4 2016 calendar.

5 Dated this 20th day of April, 2016.

6
7 

BENJAMIN H. SETTLE
United States District Judge